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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 484.

ROBERT J. BLAUNER,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF.

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We request the indulgence of the Court to permit us, by this short reply brief, to call attention to errors and misstatements in the Brief of the United States in Opposition.

1.

On pages 5 and 6 of the Brief in Opposition, reference is made to payments made by Lithofold to one James P. Finnegan, a former Collector of Internal Revenue at St. Louis, and in a footnote on said page 6, it is said:

> "Finnegan was *convicted of accepting bribes* in an earlier prosecution in which Lithofold was involved. **Finnegan v. United States**, 204 F. 2d 105 (C. A. 8)." (Emphasis by italics supplied.)

In addition to the fact that any payments made by Litho fold to Finnegan in 1951 were and are not even contended to have been a factor in any income tax delinquency of Lithofold for that year, the above-quoted statement is wholly incorrect. Examination of the decision cited will at once demonstrate that there Finnegan was *acquitted* of the bribery charges under Section 202, Title 18, U. S. C., contained in Counts IV and V of a five-count indictment, and was acquitted upon one, and convicted upon two, of the remaining three counts, all charging violation of Section 281, Title 18, U. S. C.—which has nothing to do with bribery.

Counsel for the Government in its Brief in Opposition here are following the identical, prejudicial course laid out by counsel for the Government at the trial of this case, in injecting "bribery" into their argument, when there is no evidence of such (cf. Tr. 732-733; petitioner's Petition herein, pp. 22, 39-41, 77-78).

2.

The United States, in its Brief in Opposition, contends that there is no merit in petitioner's contention for error in the reading to the jury, on two occasions, of Count 3 of the Indictment, saying (Brief in Opposition, p. 8):

> "The reading of the indictment simply informed the jury of *the precise nature* of the charges." (Emphasis supplied.)

and, further (p. 9):

> "The court specifically instructed the jury that the only function of an indictment is *to identify the offense with which the petitioner is charged.*" (Emphasis supplied.)

Of course, an Indictment is a pleading, and, as such, is addressed to the Court, rather than to the jury, and may

be said to identify *to the Court* the offense with which the defendant is charged.

We submit, however, that a mere reading of Count 3 of the Indictment in the case at bar will conclusively demonstrate that because of its form and content it could never serve the purpose of simply informing *the jury* of the *precise nature* of the charges made, and could only serve to mislead and confuse the jury to the prejudice of petitioner, in that it contained much matter which was irrelevant, immaterial and wholly unsupported in the evidence, insofar as concerned the charges submitted, and known at the outset of the trial to be the only charges to be submitted, against petitioner.

Furthermore, as pointed out at page 39 of our Petition herein, the Court's charge that the Indictment's sole function was to "identify the offense with which the defendants are here charged," not only permitted, but in effect compelled, the jury in arriving at its verdict to determine petitioner's guilt or innocence upon *all* charges made in Count 3 of the Indictment, including those which were wholly without support in the evidence, for it was to those charges that such count of the Indictment "identified the offense" with which petitioner was charged.

The decision in **Petrilli v. United States**, 8 Cir., 129 F. 2d 101, 104 [5-8], cited by the Government, is actually authority for the position of this petitioner upon the contention made by him at the bottom of page 38 of his Petition herein.

3.

On page 9 of the Brief for the United States in Opposition to the petition for writ of certiorari herein, in connection with this petitioner's insistence of error for failure of the district court to grant a mistrial because of improper closing argument of the Government's trial counsel, it is said:

> "In the first place petitioner did not ask for a mistrial. Counsel for petitioner objected to the remark. Counsel for the co-defendant, Stanhope, then requested a mistrial, but counsel for petitioner did not join in the motion. (Tr. 732-734)."

The argument just quoted overlooks that, at the outset of the trial, and in conformity with the trial court's thinking respecting procedure to avoid duplication and confusion, it was stipulated that procedural action by any attorney for either defendant would be deemed as taken on the part of each defendant, unless the attorney for a particular defendant requested to the contrary (Tr. 2-3). This stipulation is referred to at page 22 of petitioner's Petition for a Writ of Certiorari herein. Under this stipulation, the motion of petitioner's co-defendant for a mistrial on account of improper and highly prejudicial argument, must be deemed to have been made by this petitioner, also. This is particularly true in view of the language used by one of defendants' counsel, in requesting the mistrial, for he said:

> "* * * In view of the prejudicial statement Mr. Robyn made, *we* ask the jury be discharged and a mistrial declared." (Emphasis supplied.)

Clearly, the motion for mistrial was made for both defendants who were on trial, and in accordance with the previous understanding between the Court and counsel (Tr. 2-3).

For the reasons stated here, and in petitioner's Petition herein, this petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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